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Before the
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Subcommittee On Commerce, Trade, and Consumer Protection

Oversight Hearing on
"Fair Use: Its Effects on Consumers and Industry"

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Chairman Stearns, Ranking Member Schakowsky and other members of the Subcommittee, my name is Gigi B. Sohn. I am the President of Public Knowledge, a nonprofit public interest organization that addresses the public's stake in the convergence of communications policy and intellectual property law. I want to thank the Subcommittee for inviting me to testify on the vitally important issue of fair use and its impact on consumers and industry.

Summary

The hallmark of our copyright system is balance – creators and publishers receive a limited monopoly in their works in exchange for providing the public rights of access to those works. Fair use is a key component of that balance – permitting individuals to make limited, but important uses of copyrighted works without having to ask permission of the copyright holder.

For over two hundred years, this balance, aided by fair use, has served creators, educators, libraries, consumers and the content and technology industries very well. It has resulted in greater creativity, greater innovation and greater consumer choice, and has invigorated the U.S. economy both for creative goods and technology.

Over the past decade, however, a number of legal, technological and marketplace efforts by the content industry have put fair use in great peril. These efforts include laws like the Digital Millennium Copyright Act, which prohibits circumvention of technological protection measures even for lawful uses; end user license agreements (EULAs), that restrict fair use; government-imposed technology mandates like the broadcast flag, which put agencies like the Federal Communications Commission in charge of determining what technologies consumers can use to receive digital television

and which also restrict fair uses of digital TV; and the rise of business practices that shrink fair use by requiring expensive licensing fees or denying permission for even the most incidental uses of copyrighted works.

Congress can, and must, revitalize fair use for the digital age. While my list is not comprehensive, I suggest four places where Congress can start: 1) ensure that the DMCA protects fair use, whether it be through legislation such as H.R. 1201 or by instructing the Copyright Office to follow the express intent of Congress that the triennial review be a "fail-safe" mechanism the purpose of which is to protect non-infringing uses; 2) reject any and all efforts to impose government-mandated copy protection; 3) pass legislation that protects individuals who make a good faith effort to locate copyright holders who cannot be found and 4) monitor the Google Print litigation and other related matters to ensure that search engines can continue to do what they do best – provide consumers with a comprehensive "card catalogue" of all the world's information – whether the information is online or offline.

Consumers, Creators and Industry All Benefit from a Strong and Vital Fair Use Doctrine.

Ever since the framers of the Constitution gave Congress the ability "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries…" the hallmark of our copyright system has been balance. That balance ensures both strong protection for copyrighted works and unauthorized access to those works for certain limited uses. As the Supreme Court has stated "[t]his protection has never accorded the copyright

owner complete control over all possible uses of his work."[1] The idea behind this balance was simple – the framers understood that giving individuals the ability to access protected works would lead to even greater creativity and innovation.

One of the key guardians of this balance is fair use. Fair use is a doctrine developed in common law and codified at 17 USC §107 that permits individuals to make certain limited uses of copyrighted works without seeking permission from the copyright holder. The idea behind fair use is that creativity, knowledge-building, public criticism and innovation would be severely hampered, if not completely stifled, if artists, librarians, scholars, inventors and consumers had to seek permission from rights holders even for the most mundane use of a work.

For most of the last two hundred years, this balance worked well for consumers, creators and both the content and technology industries. Because of fair use and the other limitations on copyright, the United States has been the unquestioned leader in the creation of artistic works from artists big and small, and our educational and research institutions are the envy of the world. Moreover, and particularly since the Supreme Court's ruling in *Sony v. Universal City Studios*, which ensured the growth of legal technologies, the U.S. has been the world leader in technological innovation, particularly as new digital technologies have taken the world by storm.

The benefit of this balance to consumers has also been enormous. Consumers have greater choice of movies to watch, music to listen to, video games to play and computer software to use. They have a wide variety of useful and inexpensive gadgets on which to play those movies, music, games and software where and when they want. Importantly, those gadgets permit consumers to create their own movies, music and

[1] *Sony v. Universal City Studios*, 464 US 417, 463 (1984).

games. Who could imagine, even three years ago, that people would be viewing movies and television programs on their cell phones? Or that AOL would be selling old sitcoms online? Or, that as a recent Pew Internet and American Life poll showed, 57 percent of online teens would create their own content for the Internet?[2]

Fair use has benefited everyone largely because of its flexible nature. Whereas 21 years ago the *Sony* Court talked about "time shifting" as a fair use, it is now commonly understood that the ability to play media on different machines in different places (space shifting) is a fair use as well. We must ensure that fair use remains flexible and vibrant in the digital age, so that new innovations will develop that enable new fair uses that we cannot foresee.

Unfortunately, as I will discuss in the next section, the past decade has seen a shrinking of fair use in a way that has tipped the copyright balance not in favor of creators or consumers, but in favor of large content companies. New laws, technological tools and marketplace mechanisms are being used to limit legal uses of content beyond what the copyright law traditionally allows and beyond what the framers of the Constitution intended. If course corrections are not made soon, we will reverse the vibrant market for content and technology that has grown out of the traditional balance between control and access.

Fair Use in the Digital Age is in Peril

The Supreme Court's decision in *Sony* confirmed what had been a common consumer expectation since the invention of audiotape -- that it is fair use for consumers to use the content and technology they buy for personal uses. Despite the content industry's efforts to paint consumers as copyright thieves, enormous DVD sales and the

[2] http://www.pewinternet.org/pdfs/PIP_Teens_Content_Creation.pdf

growth of online music indicate that when good content is made available both offline and online at a reasonable price and with flexibility of use, consumers will buy it. Moreover, sales of personal video recorders (PVR) (like TiVo), MP3 players (like the iPod), wireless routers, portable DVD and video game players, and digital radios with playback (like XM to-go) indicate that what consumers expect and want to do with the content they buy is the ability to play it wherever and whenever they want. They also expect that the devices they own will work with one another -- that a simple cable or port can, for example, connect a television set to a VCR or PVR or a computer to an MP3 player.

Unfortunately, this expectation of flexibility, portability and interoperability for personal use is increasingly at risk. Even though our copyright law does not give copyright holders control over when, where and how a consumer uses the content she lawfully purchases, the content industry, in its zeal to control every use of its content, has employed a variety of legal, technological and marketplace mechanisms that limit consumers fair use of technology and content. They include:

Paracopyright: Laws that Enforce Technological Protection Measures

The speed, ubiquity and relatively low cost of digital networks present greater opportunities for copyright holders to make their works available to a wider audience. However, they also present copyright holders with a tremendous challenge – how to protect those works from massive indiscriminate redistribution over those digital networks while at the same time giving the consumer flexibility to make lawful uses of the technology and content they purchase.

The content industry has attempted to meet this challenge through use of technological protection measures, otherwise referred to as Digital Rights Management (DRM) tools. While Public Knowledge does not necessarily oppose these efforts, so long as they are not government mandated, to the extent that these tools eliminate certain fair uses, the law should not prohibit their circumvention for that purpose. For example, certain DRM-protected CDs prevent the ripping or copying function of personal computer in the hopes of preventing unauthorized file trading. In some instances, those CDs will fail to play entirely. Similarly, many DVDs will not play on Linux-operated computers. The DMCA prohibits a consumer from circumventing that DRM even to make an otherwise lawful personal use of the content they purchased. The DMCA's chilling effect on fair use and on free speech have been well documented.[3]

Thus, as digital technologies and accompanying protection measures become more pervasive, laws like the DMCA virtually eliminate consumer fair use for certain content. The existence of the so-called "analog hole," which permits redigitizing of captured analog content, is cold comfort to the ordinary consumer, who doesn't know the analog hole from a hole in the wall. Although the content industry likes to tout the analog hole as the solution for limits on fair use imposed by the DMCA, it is now seeking a legislative vehicle to close the analog hole. Moreover, traditional copyright law does not judge fair use based on the technical methods by which it was made (using digital software or analog outputs); rather it looks to whether the use was otherwise lawful.

[3] *See* http://www.chillingeffects.org/anticircumvention/

Licenses that seek to replace copyright law with contract law

Another way that large corporate copyright holders seek to protect their works is through the use of so-called "end user license agreements" or EULAs. These are the windows of legal jargon that you see when trying to install or download software or other digital content (click-through licenses), or the terms you agree to when breaking the shrink-wrap on your newest piece of software (shrink-wrap licenses). Without any negotiation, you are asked to waive fair use and other rights reserved to you under the Copyright Act and agree to a list of restrictions, some of which can include a limitation on criticizing the work without the licensee's permission.

The EULA that accompanied the Sony-BMG CDs with the now-infamous rootkit DRM (which left consumers vulnerable to viruses) provides a chilling example of the kind of restrictions consumers are subject to after, and without disclosure before, purchasing digital media. Some of the restrictions include:

- all rights terminate if a consumer fails to accept any update of the protection software;
- all rights terminate as soon as a consumer files for bankruptcy;
- Sony-BMG reserves the right to exercise technological self-help mechanisms against consumers, at any time, without notice;
- consumers have no right to transfer any digital copies or software;
- consumers are prohibited from reverse engineering, and changing, altering, or creating derivative works; and
- consumers are prohibited from circumventing any restrictions that may be imposed by the software, regardless of whether or not they are "access" controls under the DMCA.

Government Mandates Limiting Access to Content via "Authorized Devices"

A recent strategy of the copyright industries is attempting to ensure that every technology that can receive and retransmit its content is "authorized" to do so by the government. The idea works like this: if a television, radio, computer, or other digital device is not pre-approved to receive or record content, then the technology is either illegal or will be otherwise rendered incapable of doing so. These types of technological mandates impose serious limitations on the ability of consumers to make fair uses of content.

The so-called digital television broadcast flag scheme, adopted in November 2003 by the FCC and vacated by the United States Court of Appeals for the District of Columbia last May, is a manifestation of this strategy. The flag scheme requires every device that can receive a digital television signal to read and obey a series of bits embedded in the signal that tell the device whether the content can be transmitted over the Internet. These devices, which include computers, cell phones and personal video recorders, in addition to TV sets, must be pre-approved by the FCC.

The broadcast flag scheme limits fair use in several important ways. For example, if I have a non-flag compliant (and therefore unauthorized) Personal Video Recorder (PVR) hooked up to my flag-compliant (and authorized) digital television set, my PVR will not be able to make a perfectly legal personal copy of a "flagged" digital television program. The flag also prohibits excerpting of digital television programming and redistribution of some or all such programming over the Internet. Thus, if a congresswoman wants to send a digital clip of her performance on *Meet the Press* to staff in her district office, she cannot do so if the show's creator embeds a flag in the signal.

Or, if a media watchdog group like the Parents' Television Council wants to post digital TV clips of its favorite and least favorite programs to its website, the broadcast flag would prohibit such activity.

Not surprisingly, the motion picture studios are seeking to have the broadcast flag reinstated, and are also asking Congress to consider a technology mandate to close the so-called analog hole. This latter proposal would require every analog device to read and obey two copy protection technologies, and would impose a series of encoding rules that would prohibit certain fair uses of content.[4] Moreover, closing the analog hole would eliminate the one safety valve for making fair use of digital content under the DMCA.

Not to be outdone, the recording industry is seeking its own government-imposed technological mandate for new digital broadcast and digital satellite radio. Like Hollywood, they are seeking to place the FCC in charge of setting a standard for digital radio receivers that would prevent consumers from making recordings of digital radio for personal use.[5] This would not only violate the Audio Home Recording Act, which specifically allows for recording of radio transmissions for personal use, but it would eliminate the decades-old practice of recording songs off the radio.

D. Rise of the Permissions Culture

Perhaps the most radical change with respect to how fair use is viewed and enforced involves neither law nor technology. Instead, it involves the increasingly common business practice of requiring permission for even the most incidental uses of

[4]Draft legislation, entitled the "Analog Content Protection Act of 2005," was discussed at a November 3, 2005 oversight hearing entitled "Content Protection in the Digital Age: The Broadcast Flag, High Definition Radio and the Analog Hole, " before the House Judiciary Committee, Subcommittee on Courts, the Internet and Intellectual Property.

[5]Draft legislation, entitled the "HD Radio Content Protection Act of 2005," was discussed at a November 3, 2005 oversight hearing entitled "Content Protection in the Digital Age: The Broadcast Flag, High Definition Radio and the Analog Hole, " before the House Judiciary Committee, Subcommittee on Courts, the Internet and Intellectual Property.

copyrighted works. Sometimes obtaining that permission will require an obscenely high licensing fee. Other times, and particularly where the copyrighted work is to be criticized, a copyright holder will simply deny permission to use it. Often, and particularly if the subsequent work has a measure of success, those who rely on fair use can expect a lawsuit. In this "permissions culture" the copyright balance is turned into one where the copyright holder has complete control and fair use becomes, as some have said, "the right to hire a lawyer." As a result, creators are often forced to change or stop their work.

A good example of the shrinking scope of fair use can be found in Professor Lawrence Lessig's book *Free Culture.* The example involves Jon Else, a documentary filmmaker who made a documentary about Wagner's Ring Cycle. The scene at issue involved stagehands at the San Francisco Opera who are playing checkers. In a corner of the room, the television program *The Simpsons* is playing. When the film was completed, Else sought to "clear the rights" to use the few seconds of *The Simpsons.* It not only took a good deal of effort to find the copyright holder, but when he did, Else was told that it would cost him $10,000 to include the clip. Rather than risk a lawsuit, Else edited *The Simpsons* out of that segment of the documentary, even though it set a particular mood for that scene.

Many more examples of the chilling effect of the permissions culture can be found in an excellent report from the American University Center for Social Media and the Washington College of Law entitled *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*,[6] and in the book *Brand Name*

[6] available at http://www.centerforsocialmedia.org/roc/index.htm

Bullies: The Quest to Own and Control Culture, written by Public Knowledge Board member and co-founder David Bollier. [7]

Four Ways to Strengthen Fair Use in the Digital Age

I agree with those who argue that our copyright law, which was last completely revised nearly 30 years old, is inadequate to address creativity in a world of ubiquitous digital networks. Thus, I would urge this subcommittee to adopt Professor Lessig's recommendation to this subcommittee in May 2004 that it "recommend the establishment of a serious and balanced study,…to consider fully how best to adjust the protections of copyright to the digital age."[8]

Regardless of the need to look at our copyright laws more comprehensively, I would like to suggest a number of ways Congress can help to revive fair use and bring back the balance to copyright the founders of our country intended.

1. Ensure the DMCA permits lawful uses

As DRM tools become more pervasive and government imposed copy protection mandates become a possibility, it becomes increasingly important that those technological protection measures can be circumvented for lawful uses.

This goal can be accomplished in two ways, neither of which is mutually exclusive. One way is for Congress to pass legislation like H.R. 1201, the Digital Media Consumers Right Act, which would permit circumvention of technological protection measures for lawful uses.

[7] available at http://www.brandnamebullies.com.
[8] http://energycommerce.house.gov/108/Hearings/05122004hearing1265/Lessig1985.htm

A second way to accomplish this goal is for Congress to clarify and strengthen the DMCA's triennial review process. As I explained in great detail when I testified before this Subcommittee in May 2004, when Congress passed the DMCA, it made clear both through the plain language of the Act and the legislative history that it intended to preserve fair use through the "fail safe" mechanism of the triennial review.[9] For the most part, however the Copyright Office, which is tasked with conducting that review, has ignored the express intent of Congress and has placed a higher burden on those seeking exemptions. The Copyright has also construed the term "class of works" too narrowly and favored particular business models over fair use in denying exemption requests.

This crimped interpretation of the plain language of the DMCA has twice caused the Assistant Secretary of Commerce, who is tasked with consulting with the Register on the review, to send a letter of protest to the Register. In 2003, the Assistant Secretary wrote:

> the standard set forth in the Notice of Inquiry (the "NOI") imposes a significantly heightened burden on proponents of an exemption, and is therefore inconsistent with the opportunity that Congress intended to afford the user community.[10]

The result has been that after two triennial reviews, the Copyright Office has granted four extremely narrow exemptions. The Copyright Office has just commenced its third triennial review, and there every reason to expect that they will maintain their crimped view of the exemptions process without Congressional action. Therefore, this Subcommittee should take the opportunity to hold hearings on the triennial review

[9] http://energycommerce.house.gov/108/Hearings/05122004hearing1265/Sohn1995.htm
[10] Letter from Nancy J. Victory, Assistant Secretary of Commerce to Ms. Marybeth Peters Register of Copyrights, (Aug. 11,2003), *available at* www.ntia.doc.gov/ntiahome/occ/dmca/dmca2003/dmcaletter_08112003.html (footnotes omitted).

process and to clarify that the burden of proof that should govern the process should be that embodied in the plain language of the DMCA.

2. Reject Government-Mandated Technological Protection Measures

This Subcommittee should reject any and all efforts by the copyright industries to have the government mandate copy protection technologies and/or serve in the role of determining what technologies will succeed and which will fail. Such one size fits all technology mandates limit competition, consumer choice and consumers' fair use rights.

First, I must distinguish government-imposed copy protection mandates like the broadcast flag from marketplace copy protection initiatives. The latter allows consumers to express themselves in the marketplace with regard to the level of copy protection that they find acceptable. This is what happened with computer software in the early 1980's. Consumers rejected software with very restrictive copy protection, and the market adjusted.

Comparing iTunes Fairplay DRM with the Sony-BMG CD rootkit DRM demonstrates why the market is the better determinant of the proper level of copy protection. While like any DRM, Fairplay can be circumvented by the most determined pirates, it provides a speed bump that allows for legal uses while keeping honest people honest. As a result, iTunes has been wildly popular with consumers. In contrast, consumers nearly revolted over the Sony rootkit DRM, which left their computers vulnerable to viruses. In a matter of days, Sony-BMG responded by first attempting to provide a security patch, and have now temporarily halted production of those affected CDs.

3. Fix the "Orphan Works" Problem

Changing the permissions culture will be a long process, necessitating changes in business practice more than in the law. Strengthening fair use will certainly help – the more creators, educators and consumers feel comfortable relying upon fair use, the more they will be willing to do so, and so far, at least, the courts have largely ruled in favor of the user.

One way that Congress can limit the negative effects of the permissions culture is to ensure that creators have access to so-called Orphan Works – works under copyright for which the rights holder cannot be found. Currently, the law does not protect an individual who conducts a good faith search for a copyright holder, but cannot find him. If the individual uses the work, and the copyright holder resurfaces, the user is subject to the full panoply of penalties the copyright law provides.

Earlier this year, the Copyright Office undertook a procedure for collecting public comments on how to fix the orphan works problem, and their recommendations are due at the end of the year. Remarkably, the vast majority of commenters, representing large content companies, college artists and public interest groups like Public Knowledge, largely agreed that the copyright law should provide a defense for those who engage in a "reasonable effort" or "good faith" search for the owners of orphan works. While there was some disagreement around the edges, for the most part, the participants agreed that Congress should ensure that the inability to find a copyright holder should not be a deterrent to creators seeking to use those works.

4. Clarify Fair Use with Respect to Search Engines

I trust that the members of the subcommittee are well aware of the debate and lawsuits surrounding the Google Print program. To review: Google is making digital copies of copyrighted and public domain works housed in five major libraries so that those copies can be searched using words and phrases from the books. When a search is requested for a work under copyright, a brief excerpt from the book appears, which includes the requested phrase surrounded by several lines of text. If Google were to digitize anything less than the entire book, the program would become useless – if you were the unlucky searcher who used a phrase that was not in the included text, you would not get the result you sought. The searcher is entitled only to a limited number of searches in the same document, and links to purchase the book are on each page of text.

In Public Knowledge's opinion, the prospect that millions of books may soon be available to be indexed and searched is incredibly exciting. It not only promotes the founders' intent by increasing access to knowledge, but it also helps authors and publishers to promote their works by exposing them to anyone with an Internet connection. The Authors Guild and the American Association of Publishers disagree, and have sued Google alleging copyright infringement.

This is not an open and shut legal case for either side. While it is generally understood and the courts have ruled that if a search engine gathers and indexes information already on the World Wide Web, that use is not infringing, the law is less clear with respect to information that is not already online. But the consequences of a court decision against Google could be staggering not only for that company and other search engines, but also for the future of the Internet itself. The Internet has become our

virtual library – it is where we come to expect to find information about anything and everything. It has also become the great equalizer – bringing knowledge to rural and urban, rich and poor areas alike. If we limited access over the Internet only to that information that is only already available online, it would be like going to the Library of Congress and only being able access half of the books.

Thus, I would urge this subcommittee to keep a close eye on the Google litigation to see if adjustments may need to be made in the future to protect the future of Internet searching and indexing and as a result, consumers ability to use the Internet to obtain the information they need and desire.

Conclusion

Fair use remains vital to maintaining the balance in copyright law that has long benefited consumers, creators, innovators and the content and technology industries. But fair use threatened with extinction unless Congress acts to revive and strengthen it for a world of digital technology and digital networks. I thank the Subcommittee for the opportunity to testify, and I look forward to your questions.